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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER METRO BROADCASTING, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Communications Commission's policies of awarding substantial preferences in comparative broadcast licensing proceedings to minority and female applicants, created in the absence of any findings of prior discrimination and applied for the sole purpose of fostering program diversity, violate the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

2. Whether Congress' 1988, 1989 and 1990 appropriations legislation, which closed down the Federal Communications Commission's first comprehensive examination of the factual, statutory and constitutional bases for its minority- and gender-based preference classification policies; defunded any reexamination of, changes in, or appeal regarding the policies, and ordered the reinstatement and maintenance of the race-, ethnic- and gender-based classifications, absent historical evidence of prior discrimination and for the sole purpose of fostering program diversity, exceeded congressional authority under Section 5 of the Fourteenth Amendment and violated the equal protection principle embodied in the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

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INTRODUCTORY STATEMENT

Petitioner, Metro Broadcasting, Inc. (Metro), urges this Court to invalidate, by unanimous decision, the race-, ethnic- and gender-based preference classifications employed by the Federal Communications Commission (FCC or Commission) in its comparative licensing process. Such action would not end the efforts of the Commission and Congress to ensure that minorities, females and other underrepresented groups are not unfairly and unlawfully denied access to broadcast facilities. As Metro will show, invalidation of the discriminatory "enhancement credits" awarded under the FCC's "best practicable service" criterion will lead to properly articulated and narrowly tailored policies which encourage female and minority access to broadcast facilities. Nor would invalidation of this preference scheme require the Court to stop all government-sponsored affirmative action plans and revisit its cases in which well-defined and properly-crafted plans were approved. As presently conceived and implemented within the Commission's modern comparative process, the FCC's "enhancement" policies, although ostensibly innocuous and politically expedient, constitute the most egregious and discriminatory government-sponsored behavior since racial segregation in public schools. Both the Commission's "program diversity" objective and its chosen method of diversity promotion, crossed the threshold of permissible race-, ethnic- and gender-based distinctions—under any of the equal protection standards devised by the various members of this Court[1]—many years ago.

Notably, whereas both the FCC, as federal respondent, and the United States Senate, as *amicus curia*, have filed briefs with the Court in this case, neither is eager to claim credit for the race-, ethnic- and gender-based qualitative enhancements or the program diversity rationale which underlies them. The Commission shuns responsibility for the enhancement policies by depicting them as "a deliberate

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[1] *See Metro Brief* at 28-32.

and considered *congressional* choice, *FCC Brief* at 18-27.[2] Similarly, the Senate's Brief stresses the *judicial* and *administrative* origins of the FCC's minority and female preference policies[3]—its main focus is upon *other* policies devised by Congress to increase *minority ownership*,[4] rather than to foster program diversity.[5] The record does not indicate that Congress lauds the policies as effective or uniquely desirable. What is clear is that the Commission and Senate, like the the court of appeals which instituted the policies[6] apparently have *perpetuated* them based upon a "herd instinct" that congressional support for the preferences exists or may be inferred; a "belief" that the burdens imposed upon non-minorities and males by the classifications em-

[2] Moreover, the Commission's own apparent support for its race-, ethnic-and gender based preference classifications must be assessed in light of codified congressional restrictions on the views the Commission is free to express. *See Metro Brief* at 16-19.

[3] *Senate Brief* at 11.

[4] The objective underlying the Commission's race-, ethnic- and gender-based classification policies is and always has been the achievement of *program diversity*, rather than the promotion of *minority ownership per se*. *See Metro Brief* at 37. *See also FCC Brief* at 27-32. This distinction is important because only the actual goal of program diversity, rather than other goals which the Commission *could* have adopted, is under review by this Court. Metro contends that the Commission's choice of program diversity as the goal underlying its classification scheme is largely responsible for the poor crafting of the Commission's preferences and their discriminatory impact upon minorities, females, non-minorities and males alike. *See discussion* at p. 3, *infra*.

[5] The Senate insinuates that its use of appropriations power to keep the policies in effect was designed to avoid permanent codification of the policies pending further consideration. *Senate Brief* at 23.

[6] Although the court of appeals is responsible for the birth of the Commission's minority preferences through its decision in *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), the majority in *Winter Park Communications, Inc.* v. *FCC*, 873 F.2d 347 (D.C. Cir. 1989), failed to address the wisdom of the court's earlier decision, instead holding that it was bound by *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), congressional action regarding the policies, and the FCC's expression of continued intent to enforce them. *Winter Park*, 873 F.2d at 355. (Pet. App. 14a-15a).

ployed are minimal or constitutionally permissible,[7] and the *knowledge* that affirmative action programs traditionally have been popular with minority groups and feminists. Unfortunately, the unspoken truth is that the preference classifications do not work to accomplish a specific objective. The fact is that the policies *look* good—but only until one looks *at* the policies.

Metro has presented its views regarding the constitutional standards which should be applied in this case and the level of scrutiny appropriate for both the preferences under review herein and the congressional enactments which perpetuate them. By this reply, Metro seeks to debunk the myth of program diversity and underscore aspects of the Commission's comparative race-, ethnic- and gender-based classifications which are relevant to the constitutional question. Metro believes that a critical analysis of the goals and effects underlying the FCC's discriminatory program will heighten the concerns of each member of this Court and cast aspersions on claims that the Commission's preferential treatment policies have even a rational basis.

ARGUMENT

I. Program Diversity Is An Ill-Defined, Poorly-Crafted And Impermissible Objective For The Imposition Of Race-, Ethnic- and Gender-Based Distinctions.

The sole justification embraced by the Commission as justification for its past and continued employment of minority and female preference classifications in broadcast licensing proceedings (other than judicial or legislative coercion) is the pursuit of "program diversity." *Metro Brief*

[7] Respondent intervenor Rainbow Broadcasting Company (Rainbow) argues that deference should be accorded the FCC's "discretion" in adopting the minority and female preference classifications. *See e.g., Rainbow Brief* at 16-19. This argument is ludicrous, however, given that the enhancement policies (other than the female preference regarding which Rainbow conducts no analysis) were forced upon the Commission by the courts and that its subsequent efforts to reexamine or repeal them were stifled by Congress. *See Metro Brief* at 6-9, 18-19.

at 37; *FCC Brief* at 27.[8] The Commission equates its program diversity objective with "the First Amendment goal of achieving the 'widest possible dissemination of information from diverse and antagonistic sources.' " *FCC Brief* at 30 (quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)). The Commission concomitantly insists that its preference classifications are not designed to benefit minorities in particular, but to assure "'that viewers and listeners of every race will benefit from access to a broader range of broadcast fare . . . .' " *FCC Brief* at 28 (quoting *Schurberg Broadcasting of Hartford, Inc.* v. *FCC*, 876 F.2d 902 (1989)).

A closer look at the placement and operation of the FCC's race-, ethnic-and gender-based preference classifications in comparative broadcast proceedings, however, reveals that the accomplishment of program diversity cannot be the Commission's true objective. At best, the stated goal is an impermissibly overbroad, muddled phrasing of the rationale originally developed for consideration of minority ownership by the D.C. Circuit. At worst, the program diversity goal represents governmental stereotyping based on arbitrarily-drawn and unconstitutional value judgments regarding optimal program content. Ironically, in the latter analysis the goal destroys itself, entrenching certain voices at the expense of others and annihilating true diversity of perspective.

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[8] *Accord Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce*, 99th Cong. 2nd Sess. 15, 16,22 (1986) (statement of Hon. Mark S. Fowler, Chairman, FCC) (*1986 Hearings*); *Minority Ownership of Broadcast Stations: Hearings on Minority Ownership of Broadcast Stations Before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 62, 69, 70 (1989) (statement of Roderick K. Porter, Deputy Chief, FCC Mass Media Bureau) (*1989 Hearings*).

A. The FCC's Consideration Of Race, Ethnicity And Gender Under The "Best Practicable Service" Criterion In Comparative Proceedings Operates Against The Selection Of Program Diversity As The Goal Underlying The Commission's Preference Classification Scheme.

As explained in Metro's Brief, the Commission has enumerated two goals underlying its comparative licensing process: (1) diversification of control of media of mass communications (diversification), and (2) achievement of the best practicable service to the public. *Metro Brief* at 5, 10-14. According to the Commission, in its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965) (*1965 Policy Statement*), "[d]iversification of control . . . is . . . desirable . . . where a government licensing system limits access by the public to the use of radio and television facilities." *Id.*[9] The "best practicable service" criterion, on the other hand, is based on "a broadcast which meets the *needs* of the public in the area to be served." *Id.*[10]

A review of the *1965 Policy Statement*, along with the lower court decisions which imposed the minority preference upon an unwilling Commission in the 1970's, reveals the glaring flaw in the FCC's diversity rationale and the crucial distinction between the enhancements awarded in comparative proceedings and other congressional and administrative programs designed to increase minority ownership in the broadcast industry: "program diversity" is really "div-

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[9] "As the Supreme Court has stated, the first amendment to the constitution . . . 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,' [citation omitted] . . . . That it is important in a free society to prevent a concentration of control of the sources of news and opinion and particularly, that government should not create such a concentration is equally apparent and well established. [citations omitted]." *Id.* at n. 4.

[10] The Commission elaborated that an important element of such "best practicable service" is "the flexibility to change as local needs and interests change." *Id.*

ersification," yet the minority and female preferences designed to increase "program diversity" are awarded under the "best practicable service," rather than the diversification, criterion. Thus, the FCC's chosen goal is improperly articulated, and cannot rise to compelling importance by virtue of the First Amendment values which permeate diversification considerations.

Numerous examples demonstrate that minority ownership—when required to be considered—was intended by the courts and Congress for evaluation under the diversification criterion, rather than the qualitative integration component of the "best practicable service" criterion. The *TV 9* court noted that "[i]t is consistent with the primary objective of **maximum diversification of ownership of mass communications media** for the Commission . . . to afford favorable consideration to an applicant who . . . gives a local minority group media entrepreneurship." 495 F. 2d at 937 (emphasis added). The same court exclaimed, in *Citizens Communications Center* v. *FCC*, 447 F. 2d 1201, 1213 n. 36 (D.C. Cir. 1971), that "the Commission simply cannot make a valid public interest determination without considering the extent to which the **ownership** of media will be concentrated or **diversified** by the grant of one or another of the applications before it." *Id.* The court followed with a suggestion that in making this determination, the Commission seek to "certify . . . those who would speak out with a fresh voice, [which] would . . . initiate, encourage and expand diversity of approach and viewpoint." *Id.* Even the FCC Minority Ownership Taskforce, in its *Report on Minority Ownership in Broadcasting* (1978), premised its recommendations upon the need for *diversification* and treated program diversity as an aspect of diversification, rather than as quality in a particular applicant which demonstrates better service.[11]

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[11] "Diversity of ideas and viewpoints is vital to a free society. Indeed the promotion of greater *diversification in the media* has been recognized as socially desirable by the FCC as well as by the courts." *Id.* (emphasis added).

Both the Senate's and Rainbow's misapprehension of the Commission's program diversity goal demonstrates the vagueness and overbreadth of the Commission's stated objective. The 1982 lottery legislation,[12] as well as other congressionally-administered programs described in the Senate's Brief, actually were based on the diversification ideal, rather than upon the anticipation that applicants with certain racial, ethnic or gender characteristics inherently provide better service. The preferences for minority ownership incorporated into the lottery statute were designed to "*further diversify the ownership of the media of mass communications.*" *Senate Brief* at 18 (emphasis added). The Summary of Argument presented in the Senate's Brief highlights Congress' concern with the "unequal distribution of control over broadcast outlets," *Senate Brief* at 3. And, Rainbow's Brief is riddled with references such as "the first Amendment values underlying the Commission's diversification policy may properly be considered . . ." *Rainbow Brief* at 18-19. However, diversification considerations are inapplicable to the Commission's preference classifications, which are firmly grounded in the integration of ownership into management aspect of the "best practicable service" criterion.

For over 25 years, the FCC has had a mechanism—the diversification criterion—through which considerations regarding whether grant of a particular application would diversify control of the media of mass communications. The criterion long has been a part of the comparative process and incorporates the First Amendment considerations which the FCC, the Senate and Rainbow view as of paramount importance. Moreover, the criterion is more precisely phrased than the all-consuming goal of assuring program diversity. The "best practicable service" objective, which is the criterion designed to measure a prospective broadcaster's abilities and qualifications to serve the public, and which is intended to be flexible, so as to allow change to meet

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[12] *Communications Amendments Act of 1982*, Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982, 47 U.S.C. §§ 309(i)(3)(A) - (4)(A).

local needs, is inappropriate for the rendering of judgments and application of presumptions founded upon a person's race, ethnicity or gender.

B. The FCC's Program Diversity Objective Contravenes The Very Purposes It Supposedly Embodies.

Metro has noted, *inter alia*, both the unnecessary overbreadth of the Commission's program diversity goal and the irrelevancy of the FCC's preference classifications to the First Amendment rationale which supposedly renders program diversity an important or compelling objective. However, the defects inherent in the Commission's comparative preference policies transcend mere misstatement of the policies' goals. The attempt to promote program diversity in the manner advocated by the Commission subverts every conceivable First Amendment tenet.

Metro questions whether explicit governmental action to promote certain kinds and types of programming is permissible under the First Amendment. Whereas, the Commission traditionally has operated upon the assumption that it can rely upon certain structural means to limit concentrations of media control (such as by limiting the number of stations one person may own)[13] the FCC's race-, ethnic- and gender-based classifications appear equivalent to content-based regulations which chill First Amendment rights. To the extent the FCC believes that the types of persons favored by its preference policies are likely to program in a predictible and desirable manner, its choice to promote ownership by such persons to benefit the listening or viewing public is content regulation, as was its requirement under the fairness doctrine that broadcasters attempt to portray diverse positions on particular issues of public importance. *See Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), *reconsideration denied*, 3 FCC Rcd 2035 (1988), *aff'd*,

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[13] *See Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce*, 99th Cong., 2nd Sess. 29-30 (1986) (statement of Hon. Mark S. Fowler, Chairman, FCC). *See also FCC Brief* at 31 n. 25.

Syracuse Peace Council v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 717 (1990). Indeed, the specific content consequences believed to result from the Commission's preference policies are the only justifications proferred for their existence. This is content regulation, prohibited not only by the First Amendment, but also by Section 326 of the Communications Act of 1934, as amended. 47 U.S.C. § 326.

Even assuming such content regulation to be statutorily and constitutionally viable, the Commission's arbitrary and exclusive enumeration of 6 groups as promoting or enhancing program diversity is antithetical to any relevant First Amendment value allegedly furthered thereby. Far from assuring the "widest possible dissemination" of diverse, antagonistic and conflicting viewpoints, the Commission's race-, ethnic- and gender-based preference classifications shut out certain viewpoints in favor of others which have no demonstrated superiority. Are minority groups and females exclusive of those categories of persons who have potential contributions to program diversity? Does the public have greater need for minority and female viewpoints than for the viewpoints of gays or lesbians? Should drug-runners be given access to the airwaves to promote views critical of the current "War on Drugs?" Are there other means of promoting program diversity than awarding preferences based on racial, ethnic and sexual characteristics? The Commission's list of diversity-promoting characteristics demonstrates that its agenda cannot consist of a quest for program diversity *qua* program diversity. Nowhere else in the comparative process are potential contributions to program diversity reviewed on a regular basis. Accordingly, the Commission would appear to be interested only in the proliferation of views by its hand-picked racial and ethnic groups, and females, rather than the promotion of *all* views, which of course it cannot accomplish. True diversity is found in the marketplace of ideas, rather than in the schemes and devices of government. *Metro Brief* at 39. The contribution of the Commission's comparative preference policies to First Amendment values is illusory; the

FCC stifles the First Amendment through involvement in programming predictions. The policies thus fail due to lack of a firm underlying objective—regardless of whether the objective, if valid, would constitute a permissible basis for the imposition of discriminatory classifications.

II. The Commission's Race-, Ethnic- And Gender-Based Preference Classifications, Although Generally Dispositive In Comparative Proceedings, Have No Demonstrated Impact Upon Either Program Diversity Or Minority And Female Ownership.

One of the most egregious and unfortunate aspects of the Commission's comparative race-, ethnic- and gender-based classifications is that, although they generally are dispositive in comparative proceedings, they fail to increase ownership of broadcast stations by minorities and females. It is this outcome that makes the burden placed upon non-minorities and males especially intolerable.

The Commission's program diversity rationale incorporates at least three implicit assumptions. First, is that application of the minority and female preferences actually results in more minority and female victories in comparative proceedings. Second, is the presumption that many if not all of these victors will construct and operate a broadcast station on the frequency awarded, becoming station owners. Finally, it is believed that these owners will transform their minority or female characteristics into programming which is perceived by the general public as representing a "diverse" viewpoint, and that the public is enriched by the resultant diversity more than it would be by programming developed in the free marketplace. A corollary to this assumption is that diversity currently is lacking. The first assumption, appears correct. The last two are insupportable.

A. The FCC's Minority And Female Preferences Are Potentially Dispositive In Every Comparative Broadcast Proceeding.

Metro's Brief documents at length the evolution of the Commission's comparative process and the hypothetical, as well as actual significance of each factor considered there-

under. *Metro Brief* at 4-15. As shown, the modern comparative process basically is a comparison of paper proposals, the guidelines for which have been specifically set forth in years of administrative decisions. Yes, there are engineering requirements, but these are met through the hiring of an engineer who, if astute, can "draft" a superior proposal without ever breaking ground or looking at a broadcast antenna. Similarly, there is a diversification criterion, but as Metro has demonstrated, this factor can be obliterated by an applicant's *promise* to divest its existing media interests in the event its application is granted. And, while there is a quantitative integration requirement, all that is required for 100%, or near 100% credit is that an applicant's principals promise to work 40 hours per week at the proposed station if victorious. Each of the Commission's applicable criteria can be overcome by virtually anyone who "knows the rules." Accordingly, the preliminaries in a comparative proceeding often amount to little more than an exchange of "scouts' honor" promises—then, consideration focuses exclusively upon an applicant's qualitative enhancement factors—which, along with the applicant's pledged quantitative integration, presumptively lead to the "best practicable service." This did not used to be overly detrimental; after all, enhancements such as local residence, civic participation and knowledge regarding the proposed community of license seem relevant to an applicant's ability to serve the public. However, the injection of minority and female preferences into the process, which in practice outweigh the preexisting enhancements, has robbed even these factors of meaning and often (as in the present case) dictates the comparative result.

The Commission does not refute these contentions. The truth is, it cannot. The FCC's Brief merely alleges that the Commission's selection process is multi-factored and lists the same factors already treated in Metro's Brief. The Commission does not deny that the factors are mitigated through other policies and regulations. That the current licensing scenario has little substance is evidenced by Congress' and the Commission's own willingness to replace the entire proc-

ess with a lottery. In fact, it is interesting that the lottery is used to justify the Commission's preference policies, rather than to admit that the existing comparative process, absent minority and female enhancements has little meaning. That the preferences are dispositive in comparative proceedings is evidenced by the present case, which was held in abeyance pending the Commission's own reexamination of the factual, statutory and constitutional underpinnings of the preference policies, and decided by the Commission only upon the direct order of Congress in connection with its action to perpetuate them.[14]

The Commission is critical of Metro's characterization of its comparative licensing process and seeks to allay the significance of Metro's listing of the cases decided by FCC administrative law judges since 1987, along with the ultimate results. However, the FCC's criticisms must be assessed in light its own prior comments regarding the ineffectiveness of its comparative process; its own suggestion that its process be modified or eliminated, and the position it must take herein due to the restrictions imposed upon it by Congress. Regardless of the reasons for grant of the overwhelming number of construction permits to minorities and/or females, at minimum Metro's study demonstrates that the cumulative effect of the Commission's preferential treatment policies and the lack of actual prejudice or discrimination within the license acquisition process, is a monopoly by minorities and females on the acquisition of new permits for operation.

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[14] Rainbow's insinuation that it defeated Metro under the quantitative integration criterion is incorrect, improper and prejudicial. As Metro's Brief and Petition set forth, the minority and female preferences applied in the instant case were dispositive of the outcome. On remand, the Commission specifically noted that "Rainbow has no clear quantitative advantage over Metro . . . " *Metro Broadcasting, Inc.*, 2 FCC Rcd 1474 (1987). Metro's qualitative enhancements also would not have been analyzed if the quantitative difference were dispositive. Finally, Metro noted in its Supplemental Brief, a copy of which has been lodged with the Court, the Commission's modification of its method of calculating part-time integration in a manner that would render Metro the *quantitative* victor. However, Metro's Supplemental Brief was rejected by the lower court and that issue is not properly under review herein.

B. The Commission's Minority And Female Preferences Do Not Result In Increased Minority And Female Station Ownership.

The most significant indication of the continued failure of the Commission's race-, ethnic- and gender-based preference classifications is that the only evidence cited in their support (under both the Commission's program diversity rationale and the "remedial" rationale purportedly embraced by the Congress)—underrepresentation[15]—has not changed significantly in the last fifteen years.[16] Since 1978, the percentage of minority-owned stations has increased only from less than 1 percent to slightly over 2 percent.[17] Moreover, the FCC's preference classifications have had a negligible impact on this increase. The primary source of the growth in minority ownership of broadcast stations has been "by far directly tied to tax certificate policy."[18]

The certain failure of the Commission's preferential treatment policies is largely due to the fact that over 70 percent of station owners acquire their properties through transfer, rather than through the comparative process.[19] The major

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[15] Metro has not abandoned its position that underrepresentation of minorities and females in broadcast ownership is insufficient evidence of past discrimination to allow congressional imposition of race-, ethnic- and gender-conscious remedies. *See Metro Brief* at 47. However, even if underrepresentation were a sufficient basis for remedial action, the action chosen, in order to be a considered and rational decision of Congress, would have to be at least reasonably calculated to relieving the underrepresentation. The comparative preference policies have a demonstrated record of failure in this regard.

[16] *See Minority Ownership of Broadcast Stations: Hearing on Minority Ownership of Broadcast Stations Before the Senate Subcommittee on Communications of the Committee on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 54 (1989) (opening statement of Senator Burns); *Id.* at 2 (opening statement by Senator Inouye).

[17] *Id.* at 2.

[18] *Minority Ownership of Broadcast Stations: Hearing on Minority Ownership of Broadcast Stations*, 101st Cong., 1st Sess. 29 (1989) (statement of James L. Winston, Executive Director and General Counsel, National Association of Black Owned Broadcasters).

[19] *Id.* at 54 (opening statement by Senator Burns).

barrier to minority ownership however, has been and continues to be the financing and capitalization of station acquisition. *Id.* This barrier is exacerbated, rather than overcome by the Commission's rote application of racial, ethnic and female preferences; the "complex, lengthy and costly nature of the FCC's comparative licensing process imposes substantial economic and other burdens (*e.g.*, legal and engineering consultant fees) on minority [and female] applicants who may not have the funds needed to withstand this regulatory maze." *Id.*

Other reasons for the failure of the Commission's preferences to produce increased minority and female ownership of broadcast facilities are set forth in Metro's Brief, and include the Commission's allowance of two-tiered ownership structures, which encourage "token" minority and/or female ownership backed by non-minority and male "passive investors," and the elimination of holding periods on transfers once a construction permit is awarded. *Metro Brief* at 22, 44. Under the Commission's rules, such "token" owners may sell their construction permits immediately upon prevailing in a comparative proceeding. *Metro Brief* at 44.

The consequence of the government's failure to focus upon financial barriers to minority ownership rather than perpetuation of the Commission's preference classifications has been to discourage the development of new ways to increase and promote minority ownership. *Id.* Invalidation of the Commission's current classification policies would place pressure upon the Commission, Congress, and the Executive Branch to implement and devise more effective ways to achieve better formulated ownership promotion goals.

C. The Commission's Minority And Female Preference Policies Do Not Result In Increased Program Diversity.

If the Commission's race-, ethnic- and gender-based preference classifications do not serve to increase minority ownership (which they demonstratedly do not), then, according to the assumptions underlying the program diversity rationale, program diversity is not enhanced. Even were there a connection between the preferences and minority ownership, no nexus between minority ownership and program diversity has been established. *Metro Brief* at 16-18. The Commission's triumphant conclusion that "a nexus between ownership and programming has been established," *FCC Brief* at 41, is outrageous. First, the Commission attempts to blur the distinction, noted hereinabove, between program diversity, an insupportable policy in the context of the comparative "best practicable service" criterion, and diversification of control of media of mass communications. The lottery legislation cited by the Commission, and the Senate report cited in support of the FCC's appropriations bill in 1987, replete with references to "diversity of programming *sources*," *FCC Brief* at 41, refer to diversification of control, not program diversity, as the objective. So does the cited *Kerner Commission Report*. *FCC Brief* at 43. Second, the quoted statement from Jesse L. Jackson, refers to a need by blacks to have "a voice that speaks to them . . . " *Id.* This clearly is not the stated foundation for the program diversity rationale. Moreover, the Commission's citation of the *CRS Report* demonstrates the forced nature of its position in this case—the Report consists of a post-hoc reorganization of materials submitted during the FCC's proceeding to reexamine its preference policies, which proceeding was abruptly terminated and never fully completed due to the congressional appropriations legislation challenged herein. Finally, the Commission has expressed its belief too many times—in fact as recently as September, 1989—that no nexus between minority and/or female ownership and program diversity has ever been demonstrated, for credibility to attach to its arguments in this case.[20]

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[20] *Minority Ownership of Broadcast Stations: Hearing on Minority Ownership of Broadcast Stations*, 101st Cong., 1st Sess. 66-67 (1989) (statement of Roderick K. Porter, Deputy Chief, Mass Media Bureau). In the Commission's words, "it may be equally likely that non-minority broadcast station owners who air programming that is targeted to appeal to the minority audience also may succeed in presenting such diverse viewpoints." *Id.*

III. The Commission's Race-, Ethnic- And Gender-Based Preference Classification Policies Operate To The Detriment Of Minorities, Females, And Non-Minorities Alike.

Both the FCC and Rainbow are quick to argue that the burdens imposed upon non-minorities by the Commission's comparative preference classification policies are minimal. *FCC Brief* at 48; *Rainbow Brief* at 31. Obviously, the reason Metro is before this Court is that the burdens are substantial, amounting to an exclusion of white males from the comparative process and a nullification of the only remaining meaningful comparative criteria, with no countervailing benefits to minorities and females.[21] However, both the FCC and Rainbow overlook that the Commission's policies impose burdens upon *minorities* and *females* as well. As pointed out in Metro's Brief, modern comparative licensing contests often amount to an "unseemly squabble pitting females against minorities," or one minority group against another. *Metro Brief* at 33 n. 90. To the extent that program diversity requires inclusion of the views of groups recognized by the Commission as "underrepresented," this aspect of the preference scheme results in a subversion of the benefits that the particular groups are supposed to achieve. Females, in particular are penalized by the fact that the gender preference is of less weight than the Commission's racial and ethnic preferences.

It is for this reason that the FCC, Rainbow, the Senate and the various *amici* filing on both sides of this case, by ignoring the Commission's *gender-based* enhancement credits, are blinded to one of the central deficiencies in the Commission's preference program. Notwithstanding that the Court granted Metro's petition for certiorari on both the gender and racial/ethnic classification issues, and notwithstanding that the Commission's suggestion on review that the female enhancement may not have been dispositive in

[21] The benefits supposedly all flow to the public at large, which "benefits" from its observance of *bona fide* minority and female views, however defined.

this proceeding was but *dicta*, as Metro has noted,[22] the minority and female enhancement classifications are inextricably intertwined and must be considered together for resolution of the issues presented herein. Metro already has anticipated the possibility that this Court's prevailing separate standards of review for race-based and gender-based classifications might leave one preference intact while resulting in the invalidation of the other. *Metro Brief* at 28-24. However, the fact that the policies share an identical rationale which the Commission has requested be given future sanction as a permissible purpose underlying race-, ethnic- and gender-based preference classifications, *FCC Brief* at 29-30, and the recognition that the preferences conflict and compete against one another within the comparative process, mandates that they be considered together.[23] The failure to do so in this case will wreak havoc on the Commission's comparative licensing proceedings and create yet another case for this Court in the near future.

The Commission's race-, ethnic- and gender-based preference classification policies also work against minorities

[22] *Metro Petition for Certiorari* at 15 n. 22. *See also Metro Broadcasting, Inc.*, 2 FCC Rcd 1474, 1475 (1987): "absent credit for its minority and female integration, Rainbow would lose its qualitative advantage over Metro." (Pet. App. 56a).

[23] *See also Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcommittee on Telecommunications, Consumer Protection, and Finance*, 99th Cong., 2nd Sess. 43 (1986) (statement of Ms. Mimi Dawson, FCC Commissioner) ("The important question is that the female preference was based on the minority preference and the D.C. Circuit's *Steele* opinion spoke of both. There is no way to look at one rationale without the other") *Id.* at 45 (statement of Mark S. Fowler, Chairman, FCC) ("it would be unfair to females as a class if you were to continue to not address the minority question in comparative hearings. It would be unfair to them to have their preference scheme considered . . . but not the minority scheme because that would result in possible unfairness within the hearing process"); *Id.* at 82 ("under the logic of prior Commission decisions, the minority and gender preference policies are linked . . . the Commission's analytical concerns about the constitutional validity of both minority and gender preferences were identical . . . even supporters of the women's preference recognized that it had been inextricably linked to minority preferences").

and females in a different way, one that was highlighted in Metro's initial Brief. The policies encourage *segregation of the airwaves* by according greater weight under the "best practicable service criterion" as minority or female participation in applicants increases. *Metro Brief* at 41. Consider the plight of Metro's integrated minority principal,Elmer N. Lincoln. Mr. Lincoln, a black male, was to serve as Metro's vice-president, and director of sales. *Metro Broadcasting, Inc.*, 96 FCC 2d 1073, 1083 (ALJ 1983) (S.J.A. 35). Mr. Lincoln lived in Longwood, Florida from 1975 to 1983, and subsequently moved to Michigan, where he established a successful automobile dealership. *Id.* However, despite Mr. Lincoln's recognized minority status and his desire and ability to enter the broadcast field, under current Commission policies Mr. Lincoln made a fatal mistake; he chose to work with four white males. Accordingly, Mr. Lincoln, an acknowledged intended beneficiary of the Commission's preferential treatment program, may not take advantage of the FCC's preferences because the Commission arbitrarily has determined that program diversity is better served by an entity that is wholly minority owned. This not only seems unfair, but the logic underlying the conclusion that his participation within Metro will be less valuable to program diversity than an all black or all hispanic applicant entity is specious. Any review of the Commission's classification scheme must take notice of the fact that minorities and females, as well as non-minorities and males are burdened by the Commission's "preference" policies.

IV. The Presence Of Congressional Action Regarding Minority Ownership And The Commission's Enhancement Policies Does Not Immunize The Commission's Race-, Ethnic And Gender-Based Preference Classifications From Constitutional Scrutiny.

The briefs of the FCC, Rainbow and the Senate attach near-dispositive significance to the fact that Congress has acted to promote minority ownership of broadcast facilities in the past and specifically acted to perpetuate the policies at issue herein. However, whereas the Court generally must be cautious in reviewing considered acts of Congress, the

realities and complexities of the Commission's licensing process warrant a much closer look. A review of Congress' other minority ownership policies, including the 1982 lottery statute, shows that the goal favored by Congress is the diffusion or diversification of control over the media of mass communications. Nothing in the legislative record suggests that Congress fully is aware of the mechanics of the Commission's comparative process and the incorporation of the preferences as attributes of participating owners which *per se* suggest *better* programming (under the "best practicable service" criterion), rather than serving as an indicia of diversification of control. In fact, the *authors* of the Senate Brief obviously are unaware of this distinction. Accordingly, Congress' concerns regarding media concentration are not presumptively compatible with the Commission's program diversity goals. This could only become apparent to Congress after considered study of the policies at issue—not the mythical review which accompanies passage of an appropriations measure. To the extent that the Senate acknowledges Congress' "broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue," *Senate Brief* at 5, Congress has neglected that mission with regard to the Commission's preference classifications. The appropriations measures challenged herein amount as much to a *shunning* of additional facts and opinions regarding the policies, as a finding that the policies meet with congressional approval.

The purported remedial justification for the Commission's policies is illusory. There is no evidence of discrimination in FCC licensing practices before Congress. Congress' attempted reliance upon underrepresentation to demonstrate such discrimination is a bold attempt at constitutionality; however, in the instant case the underrepresentation statistics stand out more as a 15-year record of failure by the Commission's enhancement policies to affect program diversity.

This Court's decision in *Fullilove* v. *Klutznick* and its clarification of that case in *City of Richmond* v. *J.A. Croson Co.*, suggests that Congress' power to impose race- and

ethnic-based classifications is not without limit. Metro has noted that support for the congressional actions at issue herein cannot be found in the Fourteenth Amendment, which serves only to curtail State discrimination. Nor can support be found in the Fifth Amendment, which purportedly limits governmentally-imposed classifications to the same extent that the Fourteenth Amendment limits the States. Finally, deference to congressional enactments should not force the view that Congress' passage of the lottery legislation, which itself is of uncertain constitutional validity and was adopted for a different purpose, somehow was equivalent to congressional adoption of the FCC's comparative preference scheme. This Court must pierce the veil of political expediency which operates to the detriment of minorities and females by depriving them of programs which address the real barriers they face in the Commission, and in everyday life. Most importantly, the Court should take notice of the fact that even a well-crafted affirmative action plan would find no hospitable dwelling-place within the FCC's currently vaccuous comparative process.

CONCLUSION

For the foregoing reasons, the decision and judgment of the court of appeals should be reversed, the Commission's minority and female preference policies declared unconstitutional, and the construction permit for Channel 65 at Orlando, Florida awarded to Metro.

Respectfully submitted,

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